Chapter 4
Criminal Law and Criminal Justice

4.1 Introduction

In modern law a distinction is drawn between delict (or tort) and crime, or between the delictual (or tortious) and criminal aspects of an act. In general, the distinction is between an act that violates an individual's rights to his person, property or reputation and one that endangers the order or security of the state. The difference between delict and crime corresponds to the difference between the two principal objects the law is concerned with, namely redress and punishment. With respect to delict, the chief aim of the law is to compensate the injured party rather than punish the wrongdoer. With respect to crime, on the other hand, the principal aim of the law is to punish the wrongdoer with a view to preventing him and others from committing the same or similar crimes in the future and/or satisfying the public sentiment that wrongdoing must be met with retribution. As previously noted, in Roman law the corresponding distinction was between *delictum* and *crimen*. The term *delictum* or *maleficium* denoted an unlawful act that caused loss or injury to the person, property, honour or reputation of another. From this act there arose an obligation on the part of the wrongdoer to pay a penalty or compensate the victim for the harm suffered. The word *crimen*, on the other hand, signified a wrongful act that was directed against the state, or the community as a whole, and was prosecuted and punished by state organs. However, in Roman law the two concepts to some extent overlapped, since the law of delicts, besides being concerned with compensation for the victim, sought also to inflict punishment on the wrongdoer. This can be explained on the ground that the relevant penalty (*poena*) originated as the formalization of the primitive right to exact revenge and was imposed as a punishment on the wrongdoer that went not to the state, as in the ordinary criminal process, but to the victim. In Roman law the distinction between delict and crime mainly derived from the fact that with respect to the former case the victim could

G. Mousourakis, *Roman Law and the Origins of the Civil Law Tradition*,
DOI 10.1007/978-3-319-12268-7_4

recover compensation *and* inflict punishment on the wrongdoer by means of a private action in civil proceedings and not through prosecution by state organs.

It should be noted that the criminal law holds a secondary place on the Roman legal scene. It was private law to which the Roman jurists devoted their main interest, and it was the private law that gave Roman law its great importance as a basis of much of modern law. It was not until the second century AD that Roman juridical literature began giving serious attention to matters of criminal law. Prior to that we have to rely mainly on literary sources, whose focus of attention is largely on the upper social classes. The test was whether a criminal case made a good story, and the best stories were those involving persons in positions of power. This leaves us in the dark as to how the ordinary citizen fared, in particular when prosecuted for common (as opposed to political) offences. Nevertheless, even with this qualification, the sources give valuable insight into how the Romans thought about crime and criminal justice.

4.2 Crime and Criminal Justice in the Archaic Era

In the earliest period of Roman history, many acts that in modern law are treated as offences against the state and prosecuted by public authorities were regarded as private wrongs that presented the injured party or their family with a rightful claim to seek vengeance on the wrongdoer. Moreover, certain wrongful acts directed against the community as a whole were regarded as public crimes and were pursued and punished by the state itself. However, during this period the list of crimes was invariably short and embraced offences that directly threatened the existence and security of the community, such as treason (*proditio*, *perduellio*)[1] and murder (*parricidium*)[2]; and religious offences of a particularly heinous nature, such as blasphemy and other sacrilegious acts, which, unless duly punished and atoned

[1] The crime of treason was committed when a Roman citizen acted in a way that rendered him an enemy of the Roman state. Its scope embraced acts such as assisting an enemy in time of war, inciting an enemy to attack the Roman state, delivering a Roman citizen to an enemy and inciting an internal rebellion.

[2] It seems that initially *parricidium* was as a rule treated as a matter to be settled between the offender and the deceased's kin, whether by regulated vendetta or by judicial process. This view derives support from a law attributed to King Numa, according to which if anyone killed a man by accident he could atone for the deed by sacrificing a ram before the dead man's agnates at a public meeting. One might perhaps surmise that there were two concurrent procedures, private and public. It should be noted, further, that avenging the killing of a kinsman was regarded as a religious duty. This notion was so deeply rooted, that long after murder was established as a crime against the state, a kinsman was bound to initiate a prosecution against the killer; if he failed to do so, he was not allowed to obtain any of the deceased person's inheritance.

for—as a rule by the sacrifice of the offender to the deity concerned (*consecratio capitis*)[3]—were liable to provoke the gods' wrath against the entire community.[4]

With the exception of treason, which was always regarded as a public crime, there is uncertainty as to which offences were treated as crimes and which as private wrongs in the Law of the Twelve Tables. This legislation made some provision, the nature of which is unclear, on infaming incantations, which was treated as a capital offence. An adult who pastured his animals on another's land or took another's crops by night was to be sacrificed to the goddess Ceres, but a child might only be flogged and either made bondsman to the victim or fined. A person who willfully set fire to a building or an adjacent stack of hay was to be scourged and burned to death, but a fine or a flogging was sufficient penalty for an accidental fire. It was considered lawful to slay a thief by night, or an armed thief in daytime, provided that this was not done privily. Thieves caught in the act were scourged and delivered as bondsmen to their victims if they were freemen; if they were slaves, they were scourged and hurled from the Tarpeian Rock. Children who committed theft were scourged at the praetor's discretion and reparation was made. A corrupt judge or arbiter was subject to capital punishment and a person who gave false testimony was to be flung from the Tarpeian Rock. A point to note here is that from a very early period the Romans drew a distinction between the responsibility of an adult and that of a child, and between deliberate and negligent acts. In general, the penal provisions of the Twelve Tables combined archaic and more progressive aspects. Like all ancient legal systems, their starting-point was the notion of revenge, although priority was now given to retaliation through state-supervised procedures. The state intervened and imposed penalties only in cases of treason or certain religious offences that directly affected the welfare of the community. However, it is not until we come to the period of the late Republic that the list of recognized crimes (*crimina publica*) begins to resemble a system of criminal law.

According to Roman tradition, in the Monarchy era the king, who possessed all jurisdiction in principle, was accustomed to delegating his criminal jurisdiction in cases of treason to a pair of judges (*duumviri perduellionis*), who were specially appointed for each occasion, and in cases of murder to a pair of standing judges called *quaestores parricidii*. Regarding the capital sentences pronounced by either of these pairs of judges, the king had the discretion to allow an appeal to the people

[3] Such punishment served to restore the harmony between the community and the gods (*pax deorum*) by eliminating the state of collective impurity created by the commission of the offence. In later times the sacrifice of the offender was replaced by the milder penalty of outlawry and the confiscation of goods. As this penalty involved the exclusion of the offender (referred to as *sacer homo*) from the community and from the protection of human and divine law, anyone could kill the offender with impunity; his killing was regarded as a sacrifice to the deity he had sinned against. Offences against the gods were dealt with by the *pontifices*.

[4] It should be noted, however, that in the earliest period of Roman history the distinction between secular and religious crimes was not clearly made. Treason, for example, was also construed as an offence against the gods protecting the community, and the execution of the offender as a sacrifice to them. A strong religious element can also be traced in the crime of murder.

(*provocatio ad populum*), and could endorse their judgment on whether the offender should be killed or freed.[5] However, it is impossible to ascertain the entire truth in the traditional account.[6]

After the establishment of the Republic, jurisdiction over the major crimes was vested in the consuls. The authority to adjudicate (*cognitio*) derived from their right of supreme coercion (*coercitio maior*) derived from their *imperium*. If a case of treason (*perduellio*) arose, the consuls nominated two judges (*duoviri perduellionis*) to conduct the inquiry and pronounce the sentence.[7] In cases of murder (*parricidium*) the two quaestors acted as judges and in this capacity were designated *quaestores parricidii*.[8] The jurisdiction of the curule and plebeian aediles encompassed cases involving offences against the public order or public morals, and contraventions of statutory enactments. From the third century BC, jurisdiction in cases involving persons belonging to the lower classes and slaves was assigned to the *tresviri capitales*, lower magistrates who exercised police functions in Rome. A criminal prosecution could be based on a statutory enactment (such as the Law of the Twelve Tables), an established customary norm or an order of a state organ. Originally, criminal proceedings had an entirely inquisitorial nature. As soon as the commission of a crime captured a magistrate's notice, he had the responsibility to initiate such investigation of the case as he deemed necessary. There was no such thing as a third party participating formally in the proceedings as prosecutor or accuser and producing evidence to establish the accused's guilt. It was the duty of the magistrate to both instigate a charge against an individual and take steps to procure the necessary evidence and thus, in a sense, he acted as prosecutor as well as judge.

According to Roman tradition, the *lex Valeria*, a statute passed in the first year of the Republic, stipulated that a Roman citizen could not be slain pursuant to a magistrate's sentence without a right of appeal to the people (*provocatio ad populum*). The Law of the Twelve Tables confirmed this rule that a capital

[5] The notion of *provocatio ad populum* first appears in the sources that elaborate the trial of Horatius, under King Tullus Hostilius. See Livy 1. 26.

[6] Modern scholars have expressed doubts as to whether the *duumviri perduellionis* and the *quaestores parricidii* originated from the period of the kings, and there is evidence suggesting that the right of appealing to the assembly was first granted by a *lex Valeria* enacted soon after the establishment of the Republic.

[7] However, since the middle of the third century BC cases of *perduellio* were usually tackled by the *tribuni plebis* and the appointment of *duoviri perduellionis* became virtually obsolete. Furthermore, a less grave crime of a similar nature, the *crimen laesae maiestatis* (or *maiestas*) was recognized, which consisted in acts that tended to impair the power, renown and dignity of the Roman state. It should be noted that the dividing line between *perduellio* and *maiestas* was never precisely drawn.

[8] The original title of the quaestors seems to have been *quaestores parricidii*, which indicates that their duties in the administration of criminal justice came first in order of time. As their financial duties assumed increasing prominence, they were designated as *quaestores parricidii et aerarii*, and finally as *quaestores* simply. This, at any rate, is a possible explanation for an obscure matter.

sentence[9] pronounced by a magistrate could not be executed unless on appeal it had been ratified by the people. A provision of the same statute rendered the *comitia centuriata* (therein referred to as *comitiatus maximus*) uniquely competent to deal with appeals against capital sentences. On the other hand, appeals against pecuniary sentences were tackled by the *comitia tributa* or the *concilum plebis*, depending on whether the relevant sentence was pronounced by a magistrate of the *civitas* or the *plebs*.[10]

However, we may observe after the enactment of the Law of the Twelve Tables the invariable practice of magistrates *cum imperio* to refrain from pronouncing a sentence that could be challenged on appeal to the people. The reason is that only the assembly of the centuries had authority to impose a death sentence once a person was declared guilty of a capital offence. Accordingly, criminal jurisdiction was exercised by magistrates alone only in cases involving less serious offences.[11]

The rules concerning appeals and the restrictions imposed on the magistrates' judicial powers by legislation entailed the exercise of criminal jurisdiction by the Roman people in important cases during most of the republican period.[12] The procedure adopted in trials before the people (*iudicia populi*) is only discoverable in the descriptions of writers from a later date and a great part remains obscure. Sources reveal that the magistrate who resolved to impeach a citizen, after duly summoning the accused, held a trial in (at least) three successive public meetings (*contiones*). During these meetings he investigated the case and determined matters of fact and law based on the produced evidence.[13] If the accused was found guilty, the magistrate issued an order summoning the appropriate assembly to meet on the

[9] The term *poena capitalis* denoted not only the sentence of death inflicted in one or another of different ways, but also a sentence entailing the loss of liberty.

[10] The right of appeal was re-confirmed and extended by the *lex Valeria Horatia* of 449 BC, the *lex Valeria* of 300 BC and the *leges Porciae* (first half of the second century BC). The *lex Valeria* is declared to have extended this right to corporal punishment, while under the *leges Porciae* an appeal could be raised against capital sentences and sentences of scourging (*verberatio*, *castigatio*) pronounced on Roman citizens anywhere (originally, the right of appeal lay only against sentences pronounced within the city of Rome or a radius of one mile therefrom). By the latter legislation the magistrate who refused the *provocatio* was probably rendered liable to a charge of treason. The question of whether the right of appeal was available to citizens serving as soldiers has been a source of difficulty to historians. Although in theory it appears that under one of the *leges Porciae* every citizen soldier had this right, in practice it is unlikely that a military commander would allow an appeal where the exigencies of military discipline called for an immediate execution of the sentence.

[11] As early as the middle of the fifth century BC, a series of legislative enactments (*lex Aternia Tarpeia*, *lex Menenia Sextia*) established the maximum limits for fines imposed by magistrates. As regards imprisonment, it should be noted that in republican times this was normally regarded as a means of preventing escape and not as a form of punishment, though no doubt a magistrate with *imperium* or a tribune of the plebs might employ it by way of *coercitio*.

[12] The jurisdiction of the popular assemblies embraced in particular political crimes or offences that affected the interests of the state.

[13] The magistrate might include more than one charge in the same accusation and could withdraw or amend the charge (or a charge) at any stage of the trial.

expiry of the regular interval of 3 market days (*trinum nundinum*).[14] During this period (3 market days amounted to 24 days) the citizens would have ample opportunities to discuss with one another the case and the issues it involved. When the assembly congregated on the appointed day, the magistrate presented a motion in the form of a bill (*rogatio*) for confirmation of the verdict and sentence. In response to this motion and without any preliminary debate, those in favour of confirmation voted '*condemno*' ('I condemn') while those against it voted '*absolvo*' ('I absolve').[15] If the majority in the assembly was in favour of condemnation, the presiding magistrate pronounced the sentence.[16] A notable feature of Roman legal procedure was the right of the accused to flee Rome as a voluntary exile at any time before the assembly's final vote. Selection of this option entailed the enactment of a decree of outlawry, or interdiction from water and fire (*aquae et ignis interdictio*). This practically meant banishment accompanied by loss of citizenship and property. The individual declared an *interdictus* was deprived of legal protection and, if he returned to Rome without permission, could be killed by anyone with impunity.

4.3 The Development of Criminal Justice in the Late Republic

Adjudication of public crimes by the people may have been efficacious in the context of a small city-state composed of conservative farmers and middle-class citizens. However, as socio-economic and political conditions became more complex, especially in the period following Rome's wars of expansion, comitial trials proved increasingly inadequate to deal with the complicated issues that criminal prosecutions frequently invoked. Quite aside from the fact that trials by the people were cumbersome and time-consuming, the escalating number of cases made adjudication of public crimes by the assemblies very difficult.[17] Inevitably, popular

[14] Where the accused was found guilty and sentenced to death or other severe punishment, he said '*ad populum provoco*': 'I appeal to the people'. Even if the accused failed to say this, it appears certain that he was assumed to have said it. For the rule was that a sentence that could be appealed against could not be carried out unless and until it had been confirmed by the people on appeal, and surely a convicted person could not be allowed to escape punishment simply by remaining silent.

[15] The voting procedure was governed by the same rules as those applicable when the assembly had to decide on a legislative proposal.

[16] It should be noted that the assembly could not alter the sentence; for example it could not reduce a capital sentence to one of fine or lower the amount of a fine. This means that if any citizen, though convinced of the accused's guilt, considered the sentence too harsh and was not prepared to uphold it, he had no alternative but to vote for absolution. Furthermore, if the assembly was prevented from meeting at all (e.g. because of a tribunician veto) or proceedings were halted before voting was completed (e.g. because of the appearance of an ill omen), the accused had to be released.

[17] The immense concentration of impoverished citizens in Rome during this period was accompanied by a rapid increase in crime, especially violent crime. At the same time, the lure for money tempted the greedy and malfeasance in office gained appeal with its anticipated high rewards. As

criminal justice eventually had to be replaced by a new and more functional court system. The gradual evolution commenced in the early second century BC with the creation, by decision of the people, of special *ad hoc* tribunals (*quaestiones extraordinariae*) for the investigation of certain offences of a political nature. These embraced offences such as abuse of power or dereliction of duty by magistrates and provincial officials, and conspiracies against public order and the security of the state. Moreover, the senate, on occasions of emergency, assumed (or usurped) the power of setting up, by its own authority alone and without the sanction of the people, special courts from which there was no appeal.[18] A tribunal of this kind consisted invariably of a magistrate *cum imperio* (i.e. a consul or a praetor) surrounded by a body of assessors (*consilium*) selected by the magistrate or the senate. The court's decision was determined by the majority of the assessors and no appeal against it was allowed as the court was regarded to represent the people. An early illustration of a special *quaestio* was the commission established by the senate in 186 BC to investigate and punish the crimes committed by members of the Bacchanalian cult.[19]

In the transformed socio-political conditions of the later Republic, the *quaestiones extraordinariae* provided a more efficient means of dealing with public crimes than the *iudicia populi*, whose role in the administration of justice gradually diminished. However, it was only with the introduction of standing courts of justice that a stricter regulation of criminal procedure was finally realized.

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no regular police force existed in Rome, the detection of criminals was usually relegated to the injured parties or common informers, and this made the prosecution of offenders very difficult.

[18] However, in 123 BC a statute passed on the initiative of C. Gracchus (*lex Sempronia de capite civis*) reaffirmed the principle that no citizen could be punished for a capital crime without the sanction of the assembly. This law seems to have forbidden the establishment of special tribunals by senatorial decree alone and without the approval of the people. Nevertheless, the senate was able to circumvent this prohibition by making use of the so-called *senatus consultum ultimum* authorizing the consuls to apply any extraordinary measures deemed necessary to avert an imminent threat to the state. In the politically turbulent years of the late Republic, the *senatus consultum ultimum* was often employed by the senatorial nobility as a weapon against their political opponents (known as *populares*). Although the latter strongly denounced this practice, they did not hesitate to resort to it themselves when there were in a position to coerce the senate.

[19] The adherents of this cult, which was based on the worship of the wine-god Bacchus, had formed secret associations and were engaged in orgiastic religious rites. After a number of cult members had been found guilty of criminal and immoral conduct, the senate issued the *senatus consultum de Bacchanalibus* declaring membership of the Bacchanalian cult to be a capital offence and instructing the consuls to hold an investigation *extra ordinem*. During the persecutions that followed more than four thousand people were put to death. The senate's action seems to have been motivated by genuine aversion to conduct that was taken to offend public morals and reflected a policy against religious associations operating in secret (the worshipping of Bacchus and other deities was permitted if done in the open and under official supervision). For the text of the *senatus consultum de Bacchanalibus* see FIRA I, 30; A. C. Johnson, P. R. Coleman-Norton, F. C. Bourne (eds), *Ancient Roman Statutes* (Austin 1961), No. 28.

4.3.1 The Permanent Jury Courts

A turning-point in the history of Roman criminal law was the creation of standing courts (*iudicia publica* or *quaestiones perpetuae*) authorized to adjudicate crimes of a specific nature. The first of these courts was instituted to investigate allegations of abuse of power by senatorial magistrates charged with provincial administration and tax collection on behalf of the Roman state. In 149 BC the tribune L. Calpurnius Piso initiated the *lex Calpurnia repetundarum*, a plebiscite that established a standing tribunal (*quaestio de repetundis* or *repetundarum*) composed exclusively of members of the senatorial class and chaired by the *praetor peregrinus* that tried cases involving extortion (*crimen repetundarum*)—an offence frequently committed by provincial magistrates against the people of their provinces.[20] The proceedings in this court bore a strong resemblance in form to a civil action,[21] and a defeated defendant was obliged to return the illicit gain to those affected.[22] No appeal from the court to the *comitia* was allowed, nor could its decisions be suspended by tribunician veto.

The establishment of the *quaestio repetundarum* later inspired the creation of other standing courts by special statutory enactments *ex post facto* for individual crimes,[23] especially crimes committed by high-ranking magistrates or army officers during performance of their duties. Thus, by the end of the second century BC, four permanent courts had been established: for extortion (*de repetundis*); for high treason (*de maiestate*)[24]; for electoral corruption (*de ambitu*)[25]; and for embezzlement of public money (*de peculatu*).[26]

[20] The money and other effects that were allegedly extorted, and would be restored if the prosecution proved successful, were known as *pecuniae* or *res repetundae*, or simply *repetundae*. One should note that a charge of extortion could only be instituted against a provincial magistrate after he had demitted office.

[21] As in civil actions, proceedings were initiated by the injured party, who in this case were the aggrieved provincials.

[22] In later years, the person found guilty of extortion was condemned to pay twice the value of the illegally appropriated property; other penalties that could be imposed included the expulsion of the offender from the senate and the declaration that he was an *infamis*.

[23] The Romans neither shared the modern reluctance to create extraordinary or special tribunals nor did they espouse the principle enshrined in many contemporary legal systems against retroactive legislation.

[24] In the later republican era, treason meant the betrayal of Roman citizens to an external enemy; the same offence also encompassed certain acts of provincial governors, such as waging war or leaving one's province without authorization. The scope of treason was considerably broadened during the imperial age.

[25] *Ambitus* was a vaguely defined crime because it consisted in going beyond understood but unstated limits on what could properly be expended in attracting votes.

[26] The crime of *peculatus* was distinguished from the theft of private property, termed *furtum*. The punishment for embezzlement of public funds was normally a fine that usually amounted to four times the value of the stolen property.

Under Sulla's government (82–79 BC), the standing court system was extended further and the entire machinery of the *quaestiones perpetuae* was overhauled to place the administration of criminal justice on a more firm and consistent basis. The *quaestio repetundarum* was reorganized by the *lex Cornelia de repetundis*, and the *quaestio de maiestate* instituted by Saturninus in *c*. 103 BC was recognized as the principal court for high treason by the *lex Cornelia de maiestate* of 81 BC.[27] The court dealing with electoral corruption (*de ambitu*) was also retained, while Sulla's own *lex Cornelia de ambitu* introduced heavier penalties for this crime.[28] As regards homicide, a court for hearing cases of poisoning (*quaestio de veneficis*) was apparently established before the time of Sulla. A court attending to cases of assassination (*quaestio de sicariis*) had been created as early as 142 BC, but it appears to have operated only as a *quaestio extraordinaria*. Under Sulla's *lex Cornelia de sicariis et veneficis* of 81 BC, both forms of homicide were dealt with by the *quaestio de sicariis et veneficiis*, which thus became a general murder court. The same court also tried those who attempted to procure the unlawful conviction of another person.[29] One of the permanent courts established by Sulla tackled certain forms of injury (*iniuria*) caused by acts of violence, such as beating (*pulsare*), striking (*verberare*) and the forcible invasion of another person's house (*domum introire*).[30] Sulla also introduced a *quaestio de falsis* that functioned as a court dealing with cases involving the forgery of official documents, wills and the counterfeiting of money.[31] After Sulla's

[27] Before the enactment of this law the tribunes could still convene the *comitia* to hear charges of treason. Sulla terminated this practice by restricting the powers of the tribunes. At the same time, he broadened the definition of the *crimen maiestatis* to encompass any act performed by a Roman citizen that impaired the safety and dignity of the state. The scope of this crime then embraced wrongdoings that were previously treated as *perduellio* or *proditio*, such as sedition, unlawful attacks against magistrates, desertion and the like. Moreover the *lex Varia* of 92 BC stipulated that treason was committed by those who 'by help and advice' (*ope et consilio*) induced an allied state to take up arms against Rome. In the closing years of the first century BC, two further statutes on the crime of *maiestas* were enacted: the *lex Iulia maiestatis* of Julius Caesar (46 BC) and the *lex Iulia maiestatis* of Augustus (8 BC). Several later imperial laws were based upon these statutes. The *crimen maiestatis* was punishable by death, although the person charged with the offence was usually allowed to go into exile before the court pronounced the sentence (in such a case, he was subject to an *aqua et ignis interdictio*).

[28] A series of laws devised to repress corrupt electoral practices were introduced during the second and first centuries BC, such as the *lex Cornelia Baebia* (181 BC); the *lex Cornelia Fulvia* (159 BC); the *lex Maria* (119 BC); the *lex Acilia Calpurnia* (67 BC); the *lex Tullia* (63 BC); the *lex Licinia* (55 BC); and the *lex Pompeia* (*c*. 52 BC). The last law on *ambitus* was the *lex Iulia de ambitu* passed under Augustus in 18 BC.

[29] According to sources, the first chapter of this law gave the court capital jurisdiction over those who carried weapons with the intention of killing or stealing, or who killed. The fifth chapter dealt with poisoning, i.e. the making up and selling of a drug as well as its fatal administration. See D. 48. 8. 1; C. 9. 16.

[30] This court was created by the *lex Cornelia de iniuriis* of 82 BC. Of course, *iniuria* was also a delict, and the criminal and delictual procedures operated side by side. Consider D. 3. 3. 42. 1; D. 47. 10. 5 pr.

[31] This was instituted by the *lex Cornelia testamentaria* or *de falsis* of 81 BC.

era more *quaestiones perpetuae* were implemented such as the *quaestio de vi* for crimes of violence[32]; the *quaestio de plagiariis* for kidnapping, treating a free man as a slave and inciting a slave to leave his master[33]; the *quaestio de sodaliciis* for electoral conspiracy[34]; and the *quaestio de adulteriis* for adultery.[35]

Generally, the permanent courts were governed by rules similar to those governing the extraordinary courts and, like the latter, were regarded as operating under the authority of the people.[36] It is germane to mention that the supreme jurisdiction of the *comitia* remained unaffected, in principle, by the establishment of the standing court system. In practice, however, the old comitial procedure was seldom engaged when trial by a *quaestio perpetua* was available. As the system of the *quaestiones perpetuae* approached completion, the role of the assemblies in the administration of criminal justice thus ceased.

According to the statute of 149 BC that established the *quaestio repetundarum*, the members of this court were recruited exclusively from among the senators. As provincial magistrates invariably belonged to the senatorial nobility, the above rule could engender some favour for the provincial magistrate charged with extortion. A magistrate who was retired from office and charged with extortion had the benefit of a trial by his peers and his chances of acquittal were thus greatly increased. As new permanent courts were brought into existence, this would naturally hold good in their case also. As a result of the senate's understandable reluctance to punish members of its own class, the new court system became a convenient instrument of self-protection for the senatorial oligarchy. It is thus unsurprising that the organization of the jury courts surfaced as one of the most highly contested issues in the later Republic.

In 123–122 BC Gaius Gracchus, seeking to implement his basic policy aim of curbing the senate's powers, procured the passing of a statute (*lex Acilia*) whereby

[32] This court was established by the *lex Lutatia de vi* in 78 BC; that law was supplemented by the *lex Plautia de vi* passed around 63 BC. There were two kinds of violence: *vis publica* and *vis privata*. The former covered various forms of seditious conduct that fell outside the scope of the *crimen maiestatis*, as well as the organisation and arming of gangs for the purpose of obstructing the activities of state organs. The punishment for such offences was banishment. On the other hand, *vis privata* covered acts of violence against individuals and, like theft, was considered a private offence (*delictum*). The distinction between the two forms of violence was confirmed by two laws of Augustus, the *lex Iulia de vi publica* and the *lex Iulia de vi privata*. See D. 48. 6 & 5; C. 9. 12.

[33] This court was instituted by the *lex Fabia de plagiariis* (of unknown date, but probably first century BC). D. 48. 15; C. 9. 20.

[34] Established by the *lex Licinia de sodaliciis* of Crassus in 55 BC.

[35] Installed by the *lex Iulia de adulteriis* of Augustus in 18 BC. Consider D. 48. 5; C. 9. 9. It should be noted here that adultery in a strict sense was sexual intercourse between a married woman and a man not her husband. Other sexual offences, including rape or the seduction of a freeborn boy or man, were referred to as *stuprum*. Male homosexual behavior as such was not considered illegal.

[36] In the last century of the Republic, *quaestiones extraordinariae* were still occasionally instituted by special statutes to deal with certain offences falling outside the jurisdiction of the permanent courts.

the right of sitting as members of the *quaestiones perpetuae* was transferred from the senators to the equestrians. At first, eradicating the senatorial monopoly on the administration of criminal justice appeared to be a move in the right direction. It meant that if members of the senatorial nobility controlling the provincial administration were accused of abuse of power, they would face a tribunal composed of *equites*. But in reality the transfer of control over the court system to the *equites* did not diminish the deleterious influence of factional politics on the administration of justice. It simply allowed a class whose political role was once largely neglected to participate in what was originally regarded as an 'in-house' affair. Naturally, the senatorial nobility refused to acquiesce in this situation. Thus, the issue of membership within the standing courts persisted as a prominent apple of discord and the subject matter of various legislative measures throughout the last century of the Republic. Sulla's short-lived reform restored the senate's control of the court system, which was expected in view of his general policy trends. After this event, the *lex Aurelia* of 70 BC established a more equitable balance in the composition of the juror lists. This law provided that each *quaestio perpetua* was to consist by one-third of senators, one-third of *equites* and one-third of *tribuni aerarii* (the latter are commonly understood to have been *equites* but with a lesser property qualification). In the last decades of the Republic, when the internecine strife between the senatorial factions peaked, it may appear that the equestrians had the upper hand in the standing courts.[37]

As previously noted, each *quaestio perpetua* was competent to deal only with a particular category of offence. The nature of this category was defined in the statutory enactment establishing the *quaestio*, as amended possibly by subsequent legislation. A court of this type embodied a considerable number of non-official members and was chaired by a president referred to as *quaesitor*. According to the system finally adopted, the president was normally a praetor. However, any other magistrate or even a private citizen (usually an ex-magistrate) invested with magisterial powers could be appointed president.[38] The members of the court

[37] Under the *lex Pompeia* of 55 BC, the jurors were still chosen from the three groups mentioned in the *lex Aurelia* but only the richest men within each group were eligible. The *lex Iulia iudiciorum* of Caesar, passed probably in 46 BC, excluded the *tribuni aerarii* from the lists of jurors. Finally, Augustus restored the three classes of the Aurelian law and added a fourth that represented the lower classes of the community. As Augustus exercised control over the senatorial and equestrian classes, it may be safely assumed that during his time criminal courts decided cases in line with the official, that is Augustan, policies.

[38] After the enactment of the *lex Calpurnia* (149 BC) that established the court of *repetundae*, the duty of presiding over the relevant proceedings was assigned to the *praetor peregrinus* as most claimants were foreigners. As the caseload increased and new standing courts were created, the number of praetors was later enlarged to eight and six of these presided over the courts. The praetors were assigned to the different courts by lot after the senate decided which courts should be presided over by a praetor. Usually praetors were allocated to courts dealing with offences of a political nature, such as extortion, electoral corruption, conspiracy against the state, treason and embezzlement. Aediles were usually assigned (also by lot) to courts addressing murder, violence and fraud. The presiding magistrate had to swear that he would abide by the statute that installed the court and could be liable to punishment if found guilty of corruption.

were not the president's nominees but were chosen in accordance with the provisions of the statute establishing the particular *quaestio*. Generally, a large body of qualified citizens was summoned and a complicated process involving challenges on both sides reduced this body to the prescribed number.

The form of the proceedings in the permanent courts was essentially accusatorial, as opposed to inquisitorial. This meant that no action could be initiated unless a citizen laid a formal accusation against another and thereby undertook to prosecute at the trial.[39] The sole function of the court was to hear and assess the evidence and arguments presented by the prosecution and the defence respectively, and thereafter to convict or acquit. The president publicly announced the verdict, which was thus nominally his verdict. Nevertheless, he was bound to decide the case in accordance with the opinion of the majority of the members as ascertained by a ballot. Hence, it was the members who constituted the actual adjudicators. Note that no sentence was pronounced as the penalty for the particular offence was stipulated by the statute that established the *quaestio*, and liability to this penalty ensued automatically from the conviction. A person found guilty by a *quaestio perpetua* could not appeal to the people against the court's decision.

The first step in a criminal prosecution was the *postulatio*, which constituted an application by a citizen to the magistrate directing a particular *quaestio* for permission to instigate charges. This was an essential preliminary requirement, as the applicant might be precluded by law from laying charges against any person, or against the particular person he intended to prosecute.[40] After permission to prosecute was granted, the accuser stated the name of the accused and the offence committed (*nominis et criminis delatio*) in a formal and written manner while the accused was present.[41] The document containing the accusation (*inscriptio*) was then signed by the accuser and by all those supporting his claim (*subscriptores*). Moreover, the accuser had to swear an oath that he did not issue a false accusation out of malice (*calumnia*) or in collusion with the accused (*praevaricatio*).[42] After the magistrate had formally accepted the indictment (*nominis receptio*), the accused became technically a defendant (*reus*) and the trial date was set. The accuser was granted sufficient time to prepare his case (*inquisitio*)—in most cases, 10 days

[39] Initially only the aggrieved party or his closest relatives were entitled to initiate an indictment, but in later times almost every citizen of good repute had the right to launch an indictment and conduct a prosecution. However, accusers motivated by the prospect of personal gain often abused the indictment procedure. Despite the possibility of a suit of slander against false accusers, some people even carved a profession from accusing wealthy fellow-citizens.

[40] Where two or more persons applied at the same time for leave to institute an indictment against the same individual, a panel of jurors determined who had priority by considering the cases of all those seeking permission to prosecute (*divinatio*).

[41] D. 48. 2. 3. pr.

[42] *Calumnia* (*crimen calumniae*) was committed when a person launched charges against another knowing that the latter was innocent. False accusers were liable to severe penalties that entailed infamy and exclusion from public office. *Praevaricatio* referred to the collusion between the accuser and the accused in a criminal trial for the purpose of obtaining the latter's acquittal. A person found guilty of *prevaricatio* was harshly punished and branded with infamy.

appears as the minimum period but in certain cases (especially when evidence had to be gathered from overseas) a longer period might be allowed. The accuser might also request the summoning of witnesses (a maximum of 48) by the magistrate, although the latter was free to summon as many as he thought fit (*testimonium denuntiare*). The next step in the process was the selection of the members of the court designated to try the case.[43] These were chosen by lot (*iudicum sortitio*) from the annual list of jurors (*album iudicum*) prepared by the praetor at the beginning of each year.[44] After the required number of jurors was selected in this way (50 and 75 were typical), both the accuser and the defendant had an opportunity to disallow a specified number of jurors (*iudicum reiectio*).[45] The presiding magistrate then replaced the disqualified jurors by drawing more names from the *album iudicum* (*iudicum subsortitio*).

During the trial, the accuser and the defendant dominated the scene, with their advocates and witnesses engaged in cross-examinations that were often rancorous.[46] The jurors listened in silence, while the presiding magistrate was mainly responsible for the orderly progress of the proceedings.[47] Both oral and documentary evidence was admissible.[48] Witnesses (*testes*) testified under oath and were examined by their own side and cross-examined by the other.[49] After all the evidence was presented and the closing speeches delivered, the magistrate

[43] Under the *lex Acilia* the jury had to be empanelled immediately after the *nominis delatio*. But this exposed the jurors to the dangers of intimidation and corruption. Thus subsequent to Sulla's judicial reforms, juries were empanelled after the *inquisitio* and shortly before trial day.

[44] Under the *lex Acilia* the *album iudicum* comprised 450 persons, but in later years the number was increased (probably to 900). The praetor was required to publicize the list of jurors and to swear an oath that only the best men had been chosen.

[45] Roman legal procedure was governed by the principle that a person could not be appointed as a juror without the consent of the parties concerned. The rules governing the *iudicum reiectio* were settled by the *lex Vatinia* of 59 BC.

[46] The accused stood in a particularly strong position, as he was entitled to as many as six advocates and was granted twice the total speaking time allocated to the prosecution. It should be noted that if the accuser failed to appear in court on the day of the trial his case was dismissed. On the other hand, the absence of the accused did not preclude the proceedings. However, in such a case it was required (under a law of Augustus) that a condemnatory verdict be unanimous.

[47] The magistrate's role was largely formal – he did not decide points of law, summarise the evidence and so on in the manner of a modern judge sitting with a jury.

[48] The category of documentary evidence comprised records of various kinds, such as account books (*tabulae accepti et expensi*), letters (*epistolae*), written notices (*libelli*) and, in some cases, the account books of those entrusted with the collection of public revenues (*publicani*, *tabulae publicanorum*). The written evidence also included the statements of witnesses who were unable to appear in court in person for various reasons (ill health, old age, absence from Rome and so on). It also incorporated certain public statements relating to the case issued by state organs (*testimonia publica*).

[49] Witnesses for the defence were often invited to speak not only about facts but also about the accused's character – those who testified to the good character of the accused were referred to as *laudatores*. Character evidence carried special weight and the absence of *laudatores* was regarded as in itself damning.

convened the jury and placed the question of the defendant's guilt or innocence to the vote. In early times the vote was open, but the enactment of the *lex Cassia* in 137 BC entailed the use of a secret ballot (*per tabellas*) to determine the court's decision. Each juror was given a small tablet marked on one side 'A' (*absolvo*) and on the other 'C' (*condemno*). He then erased one or the other and cast the tablet into an urn (*sitella*). Jurors also had the third choice of 'NL' (*not liquet*: not proven) if they were unable to reach a decision.[50] The verdict was determined by the majority of the votes: if there was a majority of 'C's the accused was pronounced guilty by the presiding magistrate; if the 'A's predominated or if there was an equality of votes, he was pronounced not guilty. If the majority of the jurors voted '*non liquet*' the presiding magistrate announced the necessity for a more thorough investigation into the case and fixed a day for a new hearing (*ampliatio*).[51]

As previously noted, the penalties imposed by the standing courts were specified in the statutes that instituted these courts, and liability to these penalties routinely followed upon conviction. There existed two kinds of penalties: capital and monetary. In theory, most crimes of a serious nature were capital but it was practically unknown to inflict the death penalty (*poena mortis*) on a Roman citizen deriving from a condemnation on a criminal charge in normal circumstances. The reason is that persons tried by these tribunals enjoyed a statutory right of fleeing into exile before the court pronounced its final sentence.[52] When, as invariably happened, a condemned person invoked this right, a resolution passed by the vote of the people declared his legal status as an exile and interdicted him accordingly from using water and fire (*aquae et ignis interdictio*).[53] The normal effect of this interdiction rendered the culprit liable to summary execution if discovered on Roman territory, which after the Social War (91–88 BC) covered the whole of Italy.[54] Hence, condemnation by a standing court on a capital charge virtually amounted to a sentence of banishment. It is feasible that some late republican statutes expressly substituted interdiction from fire and water with death as the penalty for certain crimes.

[50] In such a case, jurors probably had to erase both 'A' and 'C' and scratch in the letters 'NL'. Just to erase 'A' and 'C' counted as no vote.

[51] After the enactment of the *lex Servilia Glauciae* (*c.* 101 BC), proceedings in trials for extortion (*de rebus repetundis*) were divided into two distinct parts (*comperendinatio*). In the first part (*actio prima*), the parties elaborated their arguments and witnesses on both sides were called upon to testify. The second part (*actio secunda*) occurred after a day's interval and the parties were granted the opportunity to comment on the evidence presented and provide additional information. After this second hearing the jurors issued their verdict, which now only assumed the form of 'guilty' or 'innocent' (the 'not proven' option was not available).

[52] Naturally, in times of unrest persons regarded as dangerous were ruthlessly put to death. It may have been routine practice to eliminate malefactors from the lower classes by irregular means. Moreover, it should be noted that no immunity from the death penalty was ever enjoyed by non-citizens.

[53] The phrase *aquae et ignis interdictio* implies a denial of the necessaries of life to the individual in question.

[54] The relevant resolution might, however, specify an extended area within which the interdiction was operative.

The modern observer can hardly fail to form an unfavourable appraisal of the Roman administration of criminal justice. A survey of civil law and procedure would fare better as this field early displayed logical categorization and generally produced adequate results. Roman criminal justice appears as haphazard, capricious, opportunistic and remote from the contemporary standards of equal protection of the laws. Proceedings in the standing courts were cumbersome and trials could be protracted as cases were often heard more than once. Although a jury of less than a 100 members could grasp complicated evidence and assess the parties' credibility better than a crowd of thousands, jurors were often as susceptible to corruption and bribery as the people in the turbulent *iudicia populi*. A less unfavourable appraisal of the Roman criminal justice system is formed if one contemplates the immense pressures of a rapidly expanding empire. Further, the adverse circumstances of a largely haphazard evolution engendered many new concepts and categories of criminal wrongdoing (such as crimes against public order and the security of the state, various types of fraud, corruption and abuse of office) that furnished the framework for the subsequent development of the criminal law.

4.4 The Administration of Criminal Justice in the Principate Age

At the end of the republican era, the jurisdiction of the assemblies in capital crimes had entirely disappeared. The ordinary mode of criminal trial for serious offences featured a prosecution before a standing court (*quaestio perpetua*). Less serious offences were dealt with in a summary fashion by lower-grade magistrates, the *tresviri capitales*. Shortly after the establishment of the Principate, the tasks of the *tresviri capitales* were assumed by imperial officials (*vigiles*) acting under the supervision of the *praefectus vigilum*.[55] On the other hand, the standing jury-courts remained in operation for quite a long time after they were reorganized by the *lex Iulia iudiciorum publicorum* of Augustus (17 BC). This enactment drastically revised the composition of the jury-courts in the spirit of broadening the socio-economic basis of public participation, and prescribed the rules of procedure governing the conduct of trials. A general list of jurors was established comprising four categories based on status and property qualifications: senatorials; equestrians; the *tribuni aerarii*; and finally, a new class formed by the owners of property worth 200,000 sesterces (*duocentenarii*) who would be summoned in cases of minor importance. Moreover, the minimum age for jury service was lowered from 30 to 25, so that there always existed sufficient citizens to serve as jurors. In 18 BC,

[55] Offences falling within the jurisdiction of the *praefectus vigilum* included arson, robbery, burglary and theft. The most serious cases were tackled by the *praefectus urbi*. See D. 1. 15; C. 1. 45.

Augustus completed the system of *quaestiones perpetuae* by creating two new tribunals of this kind: the *quaestio de adulteriis* and the *quaestio de annona*. The jurisdiction of the first court encompassed cases of adultery (*adulterium*), extra-marital relationships involving women of a high social standing, and procurement.[56] The second court dealt with accusations against merchants who endeavoured to raise the market prices of foodstuffs, or who engaged in unfair practices relating to the supply or transportation of food.[57]

However, since trial by jury was not readily amenable to official control, the system of the *quaestiones perpetuae* was contrary to the spirit of the new imperial regime. Apart from this fact, the standing court system had several deficiencies that were not adequately addressed by the Augustan legislation. Firstly, each *quaestio* was constituted in a specific manner according to the statute that originally established it (or possibly according to some subsequent statute), and could only tackle a particular offence category as specified in such statute. Hence, frequently a wrongful act that merited punishment as a crime was not punished as it did not precisely fulfill the definitional requirements of any of those offence categories for which *quaestiones* had been instituted. Secondly, the statutory enactment establishing a *quaestio* (or possibly a subsequent statute) prescribed the punishment for the specific category of offence in question, and this punishment automatically attached on conviction. Thus, the tribunal had no power to either increase or mitigate such punishment to address the circumstances of the individual case. In general, the penalties imposed for offences captured by the jurisdiction of the jury-courts were often regarded as too mild and therefore disproportionate to the gravity of the offences committed. In addition, proceedings in the jury-courts were expensive, laborious and even protracted as the cases were often heard more than once. Thus, since the early years of the Principate the work of the jury-courts was supplemented by the new extraordinary jurisdiction (*cognitio extraordinaria*) of the emperor and those officials to whom he delegated his judicial powers. At the same time, the *princeps*-emperor sanctioned the senate's assumption of an extraordinary criminal jurisdiction. In a sense, the senate may be construed to have replaced the popular assemblies' jurisdiction and this body was resorted to mainly in cases involving offences with a political nature or any case where the accused was a senator. In principle, these two jurisdictions were concurrent but reality exposes the more extensive nature of the emperor's jurisdiction from the start. As more offences fell within the sphere of the new tribunals' jurisdiction over time, the *quaestiones perpetuae* faded into the background and finally disappeared in the early years of the third century AD.[58]

[56] D. 48. 5; C. 9. 9.

[57] D. 48. 12.

[58] No doubt the rules governing the *quaestiones perpetuae* were still used as guides by magistrates exercising extraordinary jurisdiction, even though many rules were quite inadequate to serve as a basis for a mature system of criminal law.

4.4.1 The Criminal Jurisdiction of the Senate

The criminal jurisdiction of the senate originated in the early years of the Principate period when the senate evolved as a court of law on a par with the *iudicia publica*.[59] Initially, it dealt with cases connected with the *crimen laesae maiestatis*, wrongful conduct that diminished the majesty of the emperor and the people of Rome. It also addressed cases involving abuse of power perpetrated by provincial governors. In the time of Tiberius (AD 14–37), the senate's jurisdiction was enlarged to encompass not only crimes against the security of the state (such as treason) but also a wide range of serious crimes (including adultery, murder and forgery) committed by members of the senatorial order. In this way, the senate by the end of the first century AD had developed into a *forum privilegiatum* with exclusive jurisdiction over the crimes of senators.

Trials before the senate were conducted in accordance with a procedure that blended the old rules of senatorial debate with those of the *iudicia publica*. A prosecution was launched by an application to a consul for leave to initiate an accusation (*postulatio*), followed by the accuser's formal announcement of the charge (*nominis delatio*). The magistrate to whom the application was submitted then formally registered the name of the accused (*nominis receptio*) and the trial date was established. On the appointed day, the senate was convoked and the trial commenced under the presidency of a consul. After the arguments of the parties were presented and the evidence heard, individual members submitted their motions and presented opinions. The verdict was attained by a majority vote without the involvement of the presiding magistrate. The emperor frequently participated in the judicial sessions of the senate and, as *princeps senatus*, cast the first vote that presumably carried decisive weight. The sentence became valid in law upon the final announcement of the verdict and its insertion in the official record as a senatorial resolution. No appeal to the people was available against a death sentence imposed by the verdict. Since the late second century AD, the jurisdiction of the senate was curtailed both substantially and procedurally. By the middle of the third century AD, the senators were no longer involved in the administration of criminal justice.

4.4.2 Imperial Jurisdiction

Since the era of Augustus, the operation of the emperor's domestic tribunal started to resemble a public criminal court. In time, the emperor assumed jurisdiction not

[59] During the Republic the senate did not have independent criminal jurisdiction. Its role in the administration of justice was limited to instituting, under certain circumstances, temporary courts of inquiry (*quaestiones extraordinariae*) and introducing in times of emergency any measures deemed necessary for the security of the state.

only over matters affecting him personally, such as conspiracies, but also over common-law crimes. He possessed the power to withdraw at his discretion any criminal case from the ordinary judicial authorities. In the early years of the Principate, this seems to have occurred on rare occasions. Despite any endeavours of an individual *princeps* to avoid determining cases directly as a judge, he was inevitably drawn into this activity by the appeals against court decisions and the increasing number of citizens' petitions for justice. Moreover, juristically inclined emperors, like Claudius, always sought to extend the imperial court's radius of competence by introducing cases to this court and determining them in the final instance.[60] However, a long time passed before the jurisdiction of the jury-courts and the senate was superseded by the imperial *cognitio*, especially in cases involving capital charges.

In the exercise of his criminal jurisdiction, the *princeps*-emperor was not bound by the general rules governing ordinary criminal law proceedings and had complete freedom in the composition of his council of advisors (*consilium*). He also had a free hand in the definition of offences, the choice of penalty, the mode of punishment and the degree of its severity. As the decisions of the imperial court gradually acquired the status and force of laws, criminal law evolved from its static form to broaden in scope and complexity. However, criminal law was never the subject of scientific study to the same extent as private law. As a result, the administration of criminal justice was pervaded by an element of arbitrariness that easily rendered it an instrument of oppression.[61]

In Italy, the highest criminal jurisdiction under the emperor was assigned to the city prefect (*praefectus urbi*) and the praetorian prefect (*praefectus praetorio*). By the late second century AD, the former had jurisdiction over all crimes committed in Rome and in a zone within a radius of 100 miles from the city[62]; offences committed outside that delineated area fell within the jurisdiction of the latter. These two high-ranking imperial officials had the unrestricted power to inflict any recognized form of punishment, capital or otherwise, on any offender. They could try any case in the first instance, but they also dealt with appeals against sentences of lower magistrates (central or local) endowed with an inferior criminal jurisdiction. In principle, a judgment of the *praefectus urbi* or the *praefectus praetorio* could be appealed against before the emperor. Of course, the latter could refuse to entertain such an appeal and deem the judgment in question as final. By the Severan period (late second century AD), the magistrate responsible for the maintenance of security in the capital (*praefectus vigilum*) had acquired jurisdiction in criminal

[60] Similarly, Augustus is reported to have devoted much of his time to hearing cases *extra ordinem*. See, e.g., Cassius Dio 55. 7. 2; 56. 24. 7; Suetonius, *div. Aug*. 33. 1. and 2; 51. 2.

[61] A novel and, from the modern viewpoint of the Rule of Law, highly objectionable feature of the new criminal jurisdiction of the emperor was its emancipation from the general precepts of criminal law. Thus, acts that under the common criminal law were not at all punishable could be punished as crimes and trials for acts with mandatory punishments under the general criminal statutes could result in acquittal.

[62] See D. 1. 12. 1. pr. and 4; Cassius Dio 52. 21. 1-2.

matters such as arson, burglary, robbery and theft, though he probably referred particularly grave cases to the city prefect.[63] A specialized jurisdiction over offences connected with the food supply of Rome was assigned to the *praefectus annonae*.[64] Moreover, some criminal jurisdiction was assigned by decree of the senate or imperial constitution to the consuls and praetors who tried cases *extra ordinem* assisted by a body of assessors (*consilium*).

As regards the senatorial provinces, the governor was the highest criminal (as well as civil) judge in the province. He could attend to cases either in the first instance or on appeal from lower courts. With respect to non-Roman citizens (*peregrini*), his power to inflict punishment was unfettered and no appeal against his sentences was allowed. However, his authority was fairly limited in cases involving Roman citizens: he was not entitled to pronounce the death sentence on citizens unless the latter were first granted the opportunity to have their case judged in Rome. In the imperial provinces, criminal justice was administered by imperial officials acting as representatives of the emperor (*legati Augusti*). From as early as the first century AD, the emperors started to grant those *legati* who commanded troops in their province the power to execute soldiers (Roman citizens). The latter did not possess the right to present their case before a court in Rome. In the course of time, the mass of Roman citizens living in the provinces greatly increased and it was practically impossible to send all those charged with capital offences to Rome for trial. As a result, this power (*ius gladii*) was granted to all provincial governors and was made applicable to civilians as well. However, whether or not a governor was also entitled to execute a death sentence without first applying for and receiving special authority from the emperor to do so seems for a long period to have depended on the precise terms of the particular grant. After the *constitutio Antoniniana* of AD 212 extended the Roman citizenship to all the free inhabitants of the empire, all provincial governors could wield their own authority to order the death of Roman citizens. This action was averted if a condemned person successfully appealed against the sentence. Indeed, whenever a provincial governor had duly pronounced a capital or non-capital sentence on a Roman citizen it was always theoretically possible for the latter to appeal to the emperor despite the great practical difficulties that this could entail.[65] If provincial appeals were allowed, they were usually delegated by the emperor to either the *praefectus urbi* or the *praefectus praetorio* whose decision in most cases was regarded as final.

In trials before extraordinary criminal tribunals the adopted procedure differed from that engaged under the system of the *quaestiones perpetuae* in some important respects. As we have discerned, proceedings in the latter system were set in motion

[63] D. 1. 2. 2. 33; 1. 15. 3, 1 and 4.

[64] D. 48. 12. 3. 1.

[65] A number of legal restrictions were placed on the freedom of appeal, especially after the introduction of the *constitutio Antoniniana* in AD 212. In general, on appeals the governor had a degree of discretion: he could order the execution of offenders found guilty of certain grave crimes (e.g. sedition) and refuse appeals that were only initiated to delay execution when the applicant's guilt was manifest. See D. 28. 3. 6. 9; 49. 1. 16.

by a private citizen (not a state organ) who assumed the role of the accuser by filing a charge against the alleged offender with the magistrate presiding over the competent jury-court. The *cognitio extraordinaria*, on the other hand, had a predominantly inquisitorial character. A criminal prosecution was initiated by a state organ (such as a police official or other public official) acting on information provided by the injured party or a private informer, so no formal accusation by a citizen was necessary. The magistrate in charge of the proceedings had a more active part in the trial than the president of a jury-court. The former could resort to inquisitorial methods at any time if the supposed interests of justice so demanded. Moreover, in contrast to the system of the *quaestiones perpetuae* where the guilt or innocence of the accused was determined by a panel of jurors, both the verdict and the sentence were now determined by the magistrate at his discretion. As there were no fixed penalties, the magistrate was in principle free to impose any penalty he deemed appropriate by considering the nature of the offence, the particular circumstances, and the offender's personal and social position. Over time, a body of norms developed from imperial enactments, juristic opinions and the practice of the courts. These norms more definitely fixed the scope of offences and matters relating to criminal liability and punishment. Some norms were concerned with procedural matters while others pertained to the requirements of criminal responsibility, such as conduct, intent and defences.[66]

4.4.3 Criminal Offences, Responsibility and Punishment

The criminal law of the Principate age contains elements indicative of a system that had advanced considerably beyond the system that prevailed during the Republic. This is evident from consideration of the list of criminal offences and related criminal liability requirements. Treason and sedition were serious crimes, as were various forms of abuse of power by state officials. Within the scope of treason (*perduellio*) fell the betrayal of Romans to foreign enemies, inciting allies into becoming enemies and, from the fifth century, instructing barbarians how to build ships. It was also treason for a provincial governor not to relinquish his province on the arrival of his successor. However, during this era the most common form of treason was *maiestas* or *crimen laesae maiestatis*: conduct involving a threat to the safety or dignity of the emperor and his family. Of abuses by state officials, the most common was the extortion of money or other forms of property (*res repetundae*) by provincial governors and other magistrates from provincials. Similarly liable were persons in a position of authority, such as judges, who took money to deliver or withhold a particular decision. Other offences of this kind included *peculatus*, the embezzlement of public money, usually by a person in a position of responsibility; and *de residuis*, the failure to account for all the money with which such a person

[66] Many of these norms had their origins in the republican period.

had been entrusted. In the early imperial age, the crime of public violence (*vis*) embraced the conduct of a magistrate who ill-treated a respectable citizen. In the same period, electoral corruption (*ambitus*) ceased to be of real significance, since magistrates were no longer elected by the popular assemblies but by the senate in accordance with the wishes of the emperor.

The law relating to murder was in general terms similar to modern law. The crime of parricide, however, normally defined as the murder of an ascendant, involved a separate and particularly harsh form of punishment, the *culleus* (*poena cullei*) or sack: the person found guilty was sewn up in a leather sack, probably together with snakes and other animals, and thrown into a river or the sea. Adultery, strictly speaking the sexual intercourse between a married woman and a man not her husband,[67] was a crime whilst, in contrast, male homosexual practices were not, unless they involved the rape or seduction of a freeborn boy or man.[68] The rape of women is difficult to detect in the Roman sources, partly because it was closely connected in some parts of the empire with abduction marriage. Such an offence could have been classed as serious assault (*vis*), outrage (*iniuria*) or *stuprum* (a general term for sexual crime). Incest was an abhorrent crime, based on custom, not statute. Offences against property, such as theft and damage to property, continued to be treated as delicts, although certain aggravated forms of theft, such as cattle stealing (*abigeatus*), burglary and theft at the baths, constituted criminal offences. The forgery of documents (*falsum*), especially wills, and the forging of money were serious crimes, and so was kidnapping.[69] The criminal law of this period also encompassed offences against good morals or public order, including usury and interference with the officially organized supply of cereals and other foodstuffs (*annona*). An important aspect of the criminal law pertained to the need to control the conduct of private accusers in a system that lacked a public prosecution service, and where such right of accusation was never fully replaced by a magistrate's initiative. The relevant procedural offences were calumny, prevarication and tergiversation, all regulated by the *senatus consultum Turpillianum* of AD 61. As previously noted, calumny (*calumnia*) was the bringing of a false accusation from malice. Prevarication (*praevaricatio*) involved the collusion between the accuser and the accused for the purpose of weakening or eliminating undesirable evidence or supporting spurious defences, perhaps from friendship of influence. Tergiversation (*tergiversatio*) was the withdrawal of the charge without authorization by the court, including failure to take any steps needed to continue the action. Perjury could also fall under the *senatus consultum Turpillianum*. Roman law

[67] A man was just as much an adulterer as a woman was an adulteress, but he could not be so labeled for being unfaithful to his wife, or for having intercourse with a slave woman or a prostitute or someone considered disreputable (e.g. an actress), but only with a respectable woman. The prior right to lay an accusation of adultery belonged to the husband. The woman's father and third parties, members of the public, could also bring such an accusation.

[68] Male homosexuality became a crime during the later imperial period.

[69] Kidnapping usually involved the confinement of a free person or slave. Someone who knowingly 'bought' a free person was also liable for this offence.

recognized that persons accused of crimes should be duly notified of the charges and granted the opportunity to defend themselves in a court of law.[70]

Criminal responsibility presupposed that the accused met certain requirements relating to age, sex and mental capacity. Children below the age of 7 years (*infantes*) were excluded from criminal liability as they were deemed incapable of forming the requisite criminal intent (*dolus*). Children below the age of puberty (*impuberes*—boys under 14 and girls under 12) were also presumed incapable of forming such an intent, although this presumption was construed to be rebuttable, particularly if they were approaching puberty.[71] Insane persons were also incapable of committing a crime, but this was attributed to the misfortune of their condition, which required proving, since insanity might be feigned. Moreover, they could be subject to restraint if they posed a threat to public safety.[72] A person was not criminally liable if he accidentally caused a prohibited harm.[73] Mistake or ignorance as to the law, contrary to mistake of fact, did not preclude culpability as it was held that citizens had a duty to know the law.[74] The law also recognized various defences and mitigating pleas that negated or reduced culpability for a criminal act, such as self-defence[75]; superior orders[76]; loss of self-control caused, for example, by justified anger or intoxication[77]; and duress and necessity.[78] Higher magistrates were immune from criminal prosecution during their term in office, but their immunity ended with this term.

An overt act was necessary for the commission of a crime; this could include speech (such as incitement to sedition or to murder), but a person could not be held criminally liable for thoughts alone.[79] A person who counseled the commission of a crime might be treated as committing the offence, or as being an accomplice. Accomplices were usually liable to the same penalty as the principal; they too

[70] See D. 48. 2. 3. and 7; 48. 19. 5. Slaves were in general not subject to prosecution under the system of the *ordo iudiciorum publicorum*, as the system of standing jury courts was called, largely because the relevant penalties, such as exile, were inappropriate. They could be tried, however, by the courts exercising *cognitio*.

[71] Consider D. 9. 2. 5. 2; 48. 8. 12; 29. 5. 14; 21. 1. 23. 2; 47. 12. 3. 1; 48. 6. 3. 1; 48. 10. 22 pr; C. 9. 47. 7.

[72] See D. 21. 1. 23. 2; 29. 5. 3. 11; 48. 4. 7. 3; 1. 18. 13. 1; 1. 18. 14.

[73] D. 48. 19. 11. 2; C. 9. 16. 4 (5).

[74] D. 39. 4. 16. 5; C. 9. 16. 1. Foreigners (*peregrini*) could not be expected to know the law, but these had no formal protection against the *coercitio* of the Roman magistrates and imperial officials. They were not entitled to due process, although it was often granted to them.

[75] D. 48. 8. 9; 9. 2. 45. 4; 48. 8. 1. 4.

[76] The defence of superior orders was open to a person who assisted someone under whose authority he stood, for example a son or a slave acting under his *paterfamilias*' or master's authority respectively. However, this was normally only a ground for mitigating the prescribed penalty and did not negate liability, unless the deed was not obviously criminal. See on this issue D. 48. 10. 5; 50. 17. 4; 9. 2. 37. pr; 44. 7. 20.

[77] D. 48. 8. 1. 5; 48. 5. 39 (38). 8; 48. 3. 12. pr; 49. 16. 6. 7.

[78] D. 19. 2. 13. 7.

[79] See D. 48. 19. 18.

must have possessed *dolus* and must have aided the principal with physical help, serious planning or concealment.

As previously observed, during the later Republic capital punishment practically ceased to be inflicted on Roman citizens except in times of civil unrest or strife. In cases falling within the jurisdiction of the standing jury-courts, the accused ostensibly enjoyed a statutory right of fleeing into exile within a short period after he was found guilty of a capital crime. On availing himself of that right, he was then denied fire and water by a vote of the people (*aqua et ignis interdictio*). Such an outcome essentially amounted to a sentence of banishment from Roman territory, which after the Social War (91–88 BC) meant banishment from Italy. After the establishment of the Principate, the foregoing position remained practically unchanged in the case of condemnation on a capital charge by a *quaestio perpetua*. On the other hand, when a Roman citizen was declared guilty of a capital crime by an extraordinary tribunal this often entailed death. In the third century AD, the standing jury-courts virtually vanished and proceedings before extraordinary tribunals became universal. This period also featured the extension of the Roman citizenship to all the free inhabitants within the empire. As a result of these events, the capital punishment of Roman citizens became widespread. Moreover, different forms of punishment according to social status were securely in place by this time.

In the Principate era, the social distinction between the upper and lower classes found a clear expression in the legal notions of *honestior* and *humilior*. The *honestiores* ('honourable') were comprised of the privileged members of the governing class (senators, equestrians, civil servants, soldiers and members of the provincial town councils), whilst those belonging to the lower classes of society were collectively referred to as *humiliores* ('humble'). The *humiliores* had a distinctly inferior standing in the eyes of the law and were subject to heavy and degrading punishments. By contrast, the *honestiores* were exempted from punishments of a shameful nature, and the pronouncements of death and other severe penalties against reputable citizens were rarely enforced.[80]

In relation to capital punishment the force of the distinction between *honestiores* and *humiliores* is exhibited by the fact that offenders belonging to the former group were as a general rule decapitated or conferred some other form of relatively painless and honourable death,[81] while offenders attached to the lower classes were usually subjected to cruel and degrading modes of execution, such as crucifixion, impalement, exposure to wild beasts and burning at the stake.[82] A similar distinction between the *honestiores* and the *humiliores* applied in connection with the non-capital punishments.[83] The most common forms of punishment imposed upon members of the *honestiores* class were deportation (*deportatio*) usually to an

[80] Senators and members of the equestrian order convicted of crimes, which would have brought ordinary persons heavy sentences, were only required to withdraw into exile.

[81] D. 48. 19. 8. 1.

[82] D. 48. 19. 9. 11; 8. 2; 28. pr. 11-12. and 15; 38. 1.

[83] Apart from fines (*multae*), which might be imposed on anyone.

island or oasis, and expulsion (*relegatio*) entailing the offender's exclusion from residence in a specified territory (normally Italy and one's own province). The former punishment had a more serious nature and it was accompanied by the loss of citizenship and property, though not of personal freedom.[84] The punishment of expulsion was a mild form of exile involving simple internment in an island without further consequences.[85] Other forms of punishment often inflicted on members of the upper classes included expulsion from the *ordo* to which the offender belonged, exclusion from holding civic office[86] and prohibition from pleading in the courts of law.[87]

The next focus is the non-capital punishments commonly imposed on offenders attached to the class of *humiliores*. These punishments embraced penal servitude in or around the mines[88]; confinement accompanied by some form of hard labour for the public benefit[89]; flogging; flagellation; and branding.[90] Condemnation to confinement for life with hard labour in the mines (*ad metalla*) was eventually held to involve loss of liberty. On the other hand, condemnation of a Roman citizen to confinement accompanied by some lesser form of hard labour for the public benefit (*in opus publicum*) was ultimately deemed to entail loss of citizenship but not personal freedom.[91]

4.5 Crime and Criminal Justice in the Dominate Period

In the late Empire, the scope of existing offence categories was extended and several new offences were introduced by imperial legislation to tackle new forms of wrongdoing induced by societal changes. For example, the crime of extortion (*crimen repetundarum*) was defined in a broader manner to encompass all kinds of infractions perpetrated by state officials in the course of their administrative or judicial tasks.[92] The ambit of crimes such as treason (*crimen maiestatis*) and corruption (*ambitus*) was likewise expanded,[93] and more severe penalties were

[84] *Deportatio* could only be imposed by the emperor in his judicial capacity or the *praefectus urbi* with the approval of the emperor. D. 48. 19. 2. 1; 48. 22. 6. 14.

[85] The *relegatio* was usually imposed for only a specified period. D. 48. 22. 4. 7. 14. 18.

[86] D. 48. 22. 7. 20-22; 48. 7. 1.

[87] D. 48. 19. 9.

[88] D. 48. 19. 8. 4; 48. 19. 36.

[89] D. 48. 19. 8. 11.

[90] Imprisonment (*carcer*) was used as a method for ensuring that a person would appear for trial, but it was not regarded as a legal penalty. See D. 48. 3. 2. pr; 3. 3.

[91] The chief aims of criminal punishment were declared to be general deterrence, rehabilitation, retribution and the satisfaction of the victim's family. Consider, e.g., D. 48. 19. 20; D. 48. 19. 28. 15; D. 48. 19. 16. 10; 48. 19. 38. 5; 50. 16. 131.

[92] See D. 48. 11. 1. pr.

[93] *Ambitus* now covered any attempt to climb faster or hold a rank longer in the imperial civil service contrary to established regulations. See C. Th. 9. 26 passim. The scope of *maiestas* encompassed offences such as coining or maintaining a private prison. See C. Th. 9. 11. 1; 9. 21. 9. and C. 9. 24. 3.

instituted for the offence of misappropriation of state property (*peculatus*).[94] Diverse offences were subsumed under the crime of sacrilege (*sacrilegium*) and these involved neglect or violation of imperial orders or enactments.[95] The concept of violence (*vis*) was also extended to cover acts of violence and various kinds of abuses committed by private individuals and state officials.[96] After the recognition of Christianity as the official religion of the empire, acts of opposition to the established religious doctrine were punished as crimes. The relevant offences included acts such as adherence to sectarian beliefs or to a dissident religious sect; the propagation of heretical doctrines; and refusal to observe religious holidays.[97] Moreover, an assortment of disabilities was imposed on renegades, pagans and Jews.[98]

Overall, criminal legislation in the later imperial age was fragmentary and often inconsistent, with little attention devoted to the subjective requirements of criminal liability such as *dolus* or *mens rea*.[99] The removal of all limitations on the emperor's power entailed the non-existence of safeguards in practice against the arbitrary exercise of power (except perhaps through the Church). It also meant no restrictions on the punishments that could be inflicted with the emperor's authority. The statement of the jurist Hermogenianus that interpretation should be used to mitigate rather than aggravate the penalties of the laws,[100] and the notion that it is better to let the guilty go unpunished than to condemn the innocent,[101] mentioned in the Digest of Justinian, meant very little in the later imperial era. In this savage and degenerate age, only the wealthy and powerful individuals who could corrupt or intimidate state officials and judges were relatively safe from arbitrary punishments.

4.5.1 The Court System

In the bureaucratic state of the late Empire, imperial officials exercised practically all traditional powers and functions relating to the administration of justice. Most

[94] C. 9. 28.

[95] C. 9. 29.

[96] In the field of criminal law, the distinction between *vis publica* and *vis privata* was fundamental but not always clear. The original distinction was probably based on whether an offence committed with violence affected direct interests of the state (*vis publica*) or those of a private person (*vis privata*). In the later imperial period, *vis publica* was generally understood to be committed by officials and *vis privata* by private persons. Both forms of *vis* constituted crimes against public order and were subject to severe punishment.

[97] Consider C. Th. 16. 2. 31. and C. 1. 3. 10.

[98] C. Th. 16. 10. 4. and C. 1. 11. 1. and 9; C. Th. 16. 9. 1. and C. 1. 10. 1; C. Th. 9. 7. 5. and C. 1. 9. 6; C. Th. 16. 5. 1. and C. 1. 5. 1; 1. 5. 20.

[99] In the sphere of criminal law, the term *dolus* was used to denote the intention of the wrongdoer to commit the offence and this presupposed his knowledge of the unlawful character of the act.

[100] D. 48. 19. 42.

[101] D. 48. 19. 5. pr.

officials had little or no legal training, and therefore were often assisted by legal advisers (*adsessores*) who had received legal education and had usually belonged to the legal profession. Moreover, it was quite common for senior officials to perform their judicial functions through delegates (*iudices dati* or *pedanei*); the latter were usually low-ranking officers and their decisions could be appealed against before the officials who appointed them. In general, the system of appeals corresponded directly to the hierarchical structure that was observed with regard to the administrative tasks performed by the various state officials.

At the lowest level of jurisdiction were the municipal courts (*curiales*), which possessed an extremely small sphere of competence. In the field of criminal law their powers were restricted to punishing minor offences and, in the case of other offences, to conducting the preliminaries of the trial that would normally proceed before the provincial governor.[102] In both criminal and civil cases, the provincial governors functioned as the regular (i.e. normally competent) judges of the first instance (*iudices ordinarii*) and, in addition, dealt with appeals against sentences passed by municipal courts.[103] According to the circumstances, appeals against the governor's decisions were managed by the *praefectus praetorio* of the prefecture or by the *vicarius* of the diocese that encompassed the province in question.[104] A further appeal from a *vicarius* to the emperor was feasible, but a judgment passed by a *praefectus praetorio* could not be contested on appeal as the latter was deemed the personal representative of the emperor.[105] Under exceptional circumstances, the *praefecti praetorio* and the *vicarii* could hear cases as judges in the first instance such as when a litigant suspected that a powerful adversary would intimidate the provincial governor. As regards Rome and Constantinople, the *praefectus urbi* was the highest judge within the city and the surrounding territory enveloped by his authority, and he heard appeals from ordinary judges officiating within these bounds. In theory, the emperor could exercise jurisdiction in all kinds of criminal or civil cases as a judge of first instance and on appeal. However, in practice he rarely tried cases in person as the nature of the imperial office during this period did not permit close contact between him and his subjects (cases submitted to him were usually managed by the *praefectus praetorio* or another state official authorized to act in the emperor's stead).

The system of courts outlined above dealt with the ordinary array of cases, whether of a criminal or civil nature. In addition to the ordinary courts, there existed

[102] In civil matters, these courts could only tackle cases where the amount of money at stake was trivial unless their jurisdiction was extended by agreement between the relevant parties.

[103] The primary assignment of the governors was the administration of justice as during the later Empire they did not possess military powers and the size of their assigned territories had been considerably reduced.

[104] The decisions of governors with proconsular rank were appealable only to the prefect or the emperor.

[105] In later times, a special form of appeal (*supplicatio*) against the decisions of the prefects could be submitted to the emperor. The petitioner requested the emperor for a renewed examination of a matter that normally did not permit an appeal. See C. 1. 19.

many special courts that addressed particular types of cases (usually administrative) or cases involving individuals from a particular group or class. Most of these courts had their roots in the established principle that a magistrate had administrative jurisdiction over matters connected with his departmental tasks and a disciplinary jurisdiction over his subordinates. In the fourth century AD, the sphere of competence of the special courts tended to expand at the expense of the regular courts and this provoked frequent clashes of jurisdiction. The category of special courts encompassed, for example, the court of the *rationalis* (the official who represented the public treasury in a diocese) that handled disputes relating to taxation and other fiscal matters.[106] Furthermore, the *praefectus urbi* dealt with cases involving violations of public order and breaches of building regulations. Illustrations of special jurisdictions that applied to certain categories or classes of persons included the disciplinary jurisdictions of military commanders and heads of government departments over soldiers and members of the bureaucracy respectively.[107] Members of the senatorial order fell within the exclusive jurisdiction of the *praefectus urbi* if they domiciled at Rome or Constantinople, or within the jurisdiction of their provincial governor.[108] In such cases, the decisions of provincial governors were subject to review by the emperor or the urban or praetorian prefects. Members of the clergy also enjoyed certain jurisdictional privileges in the sphere of civil law, although in criminal cases they remained subject to the jurisdiction of the secular courts. In the middle of the fourth century AD, Emperor Constantius decreed that bishops accused of criminal offences could be tried before a council of bishops with an appeal to the imperial appellate courts.[109] However, this privilege seems to have been revoked in later years.[110]

4.5.2 The Criminal Justice Process

After the disappearance of the standing jury courts (*quaestiones perpetuae*) in the third century AD, the *cognitio extraordinaria* emerged as the regular procedure for

[106] A decision issued by the court of the *rationalis* could be appealed against before the *comes sacrarum largitionum*, the minister in charge of state finances.

[107] In the fifth century AD, all crimes other than adultery committed by members of the armed forces (including officers and commanders) were not encompassed by the cognizance of the ordinary courts, but were only tried by military courts. See C. Th. 2. 1. 2.

[108] Until the time of Constantine, members of the senatorial class were deemed to be domiciled at Rome or Constantinople no matter where they actually lived. Therefore, they were regarded as falling within the jurisdiction of the prefects of the two capitals.

[109] C. Th. 16. 2. 12.

[110] See C. Th. 16. 2. 23 and 16. 11. 1. If a cleric's conduct constituted both an ecclesiastical and a secular offence, it would invoke two separate processes: disciplinary proceedings by the ecclesiastical authorities and a criminal prosecution by the secular authorities. A cleric's establishment of a sect advocating heretical doctrines is an illustration of such an offence.

criminal trials. Nevertheless, many rules of the old statutes that instituted the *quaestiones perpetuae* and clarified particular offence categories were still deemed relatively authoritative.

In most cases, criminal proceedings were set in motion by a public prosecution conducted by a judicial magistrate. Proceedings by *accusatio*,[111] where the prosecution was conducted by any competent member of the public, were still feasible.[112] However, these proceedings were now rare due to the high risks they entailed for the accuser (if the prosecution was unsuccessful the accuser faced the same punishment that the accused would have suffered, if convicted).[113] Proceedings by *cognitio* were instigated in one of three ways: (a) following a report by a minor official (e.g. a municipal officer) charged with security duties; (b) following a denunciation by the injured party or a private informer; and (c) at the initiative of a judicial magistrate. In the first case, the official who lodged an incriminating report had to appear in court to present the case against the accused. To some extent, his role corresponded to that of a private accuser in the *accusatio* proceedings. Like a private accuser, an official who laid a charge was liable to punishment if the trial did not entail the conviction of the accused; however, unlike a private accuser, he was only liable if he had initiated a false accusation knowingly and maliciously. In the second case, a private citizen informally denounced another to a judicial magistrate. The latter was obliged to act on such denunciation and to officially institute and conduct criminal proceedings against the suspect.[114] The denouncer did not play a formal role during the trial, and could not be prosecuted if the charge was unsubstantiated.[115] In the third case, an official vested with judicial functions initiated the collection of incriminating information and launched criminal charges against those detected as offenders by his agents.

In the *cognitio* proceedings, the judge at his discretion determined the date of the trial.[116] Once the trial date was established, the judge had a duty to summon the accused (this could be done either by personal notice or by edictal citation) and arraign all the witnesses required to testify in the case. In the majority of cases

[111] As elaborated previously, in the republican and early imperial periods the *accusatio* procedure was adopted in trials conducted before the *quaestiones perpetuae*.

[112] However, the incorporation of certain inquisitorial features substantially derogated from the presumed disinterestedness of the judge and the accusatorial nature of the proceedings. These features embraced, for example, control by the judge rather than the accuser over the questioning of the witnesses and the accused.

[113] On the other hand, the practice in the Principate period was to punish only the person who accused another in full knowledge of the latter's innocence.

[114] C. Th. 16. 5. 40. 8.

[115] Private denunciations devised as a basis for a criminal prosecution were not generally permissible – indeed, issuing such a denunciation could be punished as a crime (see C. Th. 10. 10.). However, as the gravity of the crime increased the range of available procedures widened to include the possibility of private denunciations.

[116] This was also the case in proceedings by *accusatio*, although it was customary for the judge to determine the date in consultation with the accuser.

(especially those involving offences of a serious nature), the alleged offender would be detained in a state prison[117] and could languish there for months waiting for the commencement of his trial.[118] At the hearing, the officer who reported the crime to the judicial magistrate was required to appear before the court and elaborate the matter, in a similar manner as an accuser addressed the court at the beginning of an accusatorial hearing. The remainder of the hearing also essentially corresponded to the equivalent stages of an *accusatio* trial, although the inquisitorial element was more pronounced than in the latter. On the other hand, when the prosecution was galvanised by information supplied by private denunciators or reports submitted by agents of the judicial magistrate, the hearing would essentially have comprised a purely inquisitorial interrogation of the accused and an examination of the available evidence. But the judge had the discretion to select the manner of these details. The judge was only constrained by the rules relating to the collection and submission of evidence.[119] It was recognized that a suspect could only be sentenced if the court was convinced of his culpability; if uncertainty predominated, the suspect was granted the benefit of doubt and absolved with a release from all restraints. A suspect's confession was deemed to constitute conclusive proof of guilt, and judges were not allowed to pass a death sentence unless the suspect had confessed or the witnesses were unanimous in identifying him as the wrongdoer. In these circumstances, judges were tempted to use torture in a limitless manner to extract

[117] Witnesses arraigned by the judge could also be secured by detention, especially in the case of witnesses destined to be examined under torture, i.e. those from the lowest strata of society, or those who were likely not to render truthful evidence of their own accord. See C. Th. 9. 37. 4.

[118] A number of imperial constitutions issued during this period were concerned with the treatment of prisoners awaiting trial. It was decreed that such prisoners (as opposed to those already convicted) had to be treated humanely (according to the perceptions of the age) – this directed, for example, that prisoners could not be manacled but only lightly chained; were granted access to the open air during daytime; not starved; and the reasons for their prolonged detention regularly investigated. However, it is doubtful whether these provisions were implemented effectively as evidenced from the recurrent references to prison malpractices in contemporary sources. Moreover, as there were always too many prisoners on remand Justinian limited the detention period to six months for a prisoner awaiting trial (or in some cases, a year) and made provision for bail. Consider, e.g., C. Th. 9. 1. 7 and 18; C. Th. 9. 3. 6. and C. 9. 4. 5; C. 9. 4. 6; C. Th. 9. 3. 1 and C. 9. 4. 1.

[119] The testimony of witnesses and the depositions of slaves were accepted as evidence only if they were factual and related to the personal experience of the witness or slave concerned. Hearsay evidence did not carry any weight, while evidence as to a person's character was permissible but accorded limited significance. The testimony of one person only was normally not admitted as proof. If there were conflicting statements before the court, their veracity was assessed by regarding the credibility of the witnesses. Congruent evidence from a number of witnesses was accorded great weight. Circumstantial evidence could probably be relied on, whether as subsidiary to other forms of evidence or as sole evidence where there were no eyewitnesses who could testify that the alleged offender actually committed the offence in question.

concordant evidence or, best of all, a confession during interrogation[120] when the accused or the witnesses belonged to the lower classes (*humiliores*).[121]

After weighing the presented evidence, the judge announced his verdict that either declared the accused guilty or absolved him of the crime. If the accused was convicted, the judge proceeded to determine the punishment to be imposed and the trial procedure ended with the passing of the sentence.[122] The law stipulated the penalties that a judge could impose. Once the judge determined that the accused's conduct conformed with the description of the relevant crime, he was obliged to impose the prescribed punishment regardless of any mitigating or aggravating circumstances.

As regards the available forms of punishment, the position was not ostensibly different from that in the later years of the Principate. However, the penalties now imposed were generally harsher than those in earlier times. The most severe punishment in Roman criminal law was the death penalty (*poena mortis*). As a rule, condemned criminals were executed in public immediately after the passing of the sentence if no appeal was lodged.[123] This usually occurred in the locality where the crime had been committed. There were four general forms of execution that the sentencing judge could impose. The most lenient of these forms was decapitation by the sword (*decollatio*, *capitis amputatio*). The remaining three forms of execution were the aggravated ones: garotting (*ad furcam*, *patibulum damnatio*), death at the stake (*vivi crematio*) and execution at the public games.[124] Other severe forms of punishment included forced labour in the mines (*ad metalla*)[125]; gladiatorial

[120] The decision whether or not to subject the accused or a witness to interrogation under torture vested in the judge, who also specified the method and degree of torture and where it would be performed. In principle, the judge could only order the accused's torture if the latter's guilt could not be proved by any other means and if a prima facie case against him had been established.

[121] Persons belonging to the upper classes (*honestiores*) were exempt from interrogation under torture.

[122] As already noted, in principle a person convicted of a crime could appeal to a higher court against the judge's decision. In practice, however, the right of appeal was subject to certain limitations. For example, leave to appeal might be refused by the trial judge if he was convinced, by virtue of an admission of guilt or other cogent evidence, that there was no merit in the appeal, or that the attempt to appeal was merely a dilatory manoeuvre; leave to appeal could also be refused to those whose actions had endangered public safety. Consider C. Th. 11. 36. 1; 11. 36. 4; 9. 40. 4. and C. 9. 47. 18.

[123] There was no general mandatory waiting period that had to elapse before the execution could occur. The only exception to this was when a death sentence was pronounced by the imperial court acting as a court of first instance; in this case, at least thirty days had to pass before the sentence could be executed (C. Th. 9. 40. 13). However, this limitation was not absolute as the emperor could, and often did, override this restriction.

[124] Emperor Constantine abolished death by crucifixion that was used for slaves and individuals of the lower class (*humiliores*) convicted of particularly grave crimes.

[125] In practice, this amounted to a deferred death sentence as most people succumbed to the terrible living conditions in the mines. A milder form of this punishment was *damnatio ad opus metalli* (condemnation to mine labour).

combat (*ad ludum*)[126]; forced labour in the public works (*opus publicum*) for life[127]; and deportation (*deportatio*).[128] The less severe, non-capital punishments embraced banishment without loss of citizenship (*relegatio*)[129]; forced labour in the public works for a fixed term; confiscation of property[130]; corporal punishment[131]; and fines (*multae*). Incarceration was not recognized as a regular form of punishment; as in earlier times, the sole function of a prison was to secure temporarily those persons awaiting trial, or convicted criminals anticipating the execution of a severe sentence.[132] A judge had to contemplate certain factors when selecting the form of prescribed sentence to impose (e.g. the death penalty or another capital punishment) or determining the appropriate penalty in exceptional cases where his discretion governed the sentence. The essential factors encompassed whether the convicted person had a free or servile status and, in the former case, the offender's social class. Generally, a servile status and inferior social status operated as aggravating factors.[133] On the other hand, persons with a higher rank (*honestiores*) enjoyed certain penal privileges: they were not sentenced to death by garrotting or at a public game, nor condemned to the mines or subjected to flagellation or forced labour in the

[126] This form of punishment was abolished in AD 399. Before this event, imperial constitutions had installed some restrictions on its imposition. A related form of punishment was *damnatio ad ludum venatorium* (a fight with wild animals), which still existed in Justinian's time.

[127] This was regarded as a less severe form of punishment than the foregoing categories, as it did not entail enslavement as a public slave but only loss of Roman citizenship. Moreover, those subjected to this sentence were not consigned to work in a high-mortality industry. Rather, they were employed in merely ignoble, debasing works, such as road building or labour in the public bakeries, the imperial weaving establishments or one of the other compulsory guild industries. See e.g. C. Th. 9. 40. 3. 5. 6; 9. 40. 7. 9; 10. 20. 9.

[128] This entailed the offender's retention of his free status accompanied by a deprivation of his Roman citizenship and banishment for life to a specific locality (usually, a small island or a desert oasis). The loss of citizenship meant the loss of all civil law rights and capacities and, in principle, the confiscation of the deportee's estate. However, in practice this was mitigated by the norm to concede all or part of the estate to his family and by the custom of granting the deportee a subsistence allowance.

[129] There were two forms of *relegatio*: *relegatio simplex* and *relegatio qualificata*. The former entailed banishment *from* a specific locality, while the latter (the more severe form) invoked banishment *to* a specific locality. Both forms of *relegatio* could be imposed for life or for only a certain period of time. The *relegatio* could be combined with additional punishments, such as the confiscation of the whole or a part of the condemned person's property.

[130] The confiscation of an offender's estate (or a part thereof) operated mainly as a subsidiary punishment that was auxiliary to the capital punishments and to *relegatio* for life.

[131] This was often imposed in cases involving minor crimes committed by slaves or by persons who were too poor to afford any fines.

[132] The conditions of imprisonment were generally appalling: convicts were kept in fetters; confined in narrow, windowless cells; never permitted into the open air; and maltreated by the prison guards. The legislative reforms initiated by Emperor Constantine to improve prison conditions related only to the treatment of prisoners awaiting trial and excluded those who had already been convicted. See C. Th. 9. 3.

[133] Slaves found guilty of grave crimes were usually sentenced to death (by one of the aggravated forms of execution), or condemned to the mines.

public works. Aggravating factors embraced transgression in office, the high incidence of the crime at issue in a particular area, and recidivism. On the other hand, the facts that the offender was youthful, a minor participant in the crime and a slave who committed the offence on the order of his master all served as mitigating factors.

4.5.3 Judicial Protection of the Lower Classes

The society of the late Empire was a non-egalitarian and rigidly stratified society where the mass of the common people (*humiliores*) were exposed to the arbitrariness of an all-powerful and deeply corrupt administrative apparatus that favoured the upper classes. Yet members of the lower classes were not entirely bereft of protection against the abuses of an arrogant officialdom. The *defensor civitatis* or *plebis* was one of the institutions established by the state for the redress of grievances suffered by the poor and lowly. The office first appeared in the diocese of the Oriens during the early fourth century AD and by the end of that century it had been extended throughout the whole empire.[134] The *defensores* were probably chosen initially by the citizens from among persons with a high social status (*honorati*) deemed sufficiently qualified to contest their peers' excesses, and this selection then awaited confirmation by the praetorian prefect or the emperor. These individuals were entrusted with the special duty of protecting the common people in a municipality against acts of extortion and oppression committed by the bureaucracy and the mighty landowners (*potentiores*, *possessores*). This authority enabled them, for example, to prevent torture in criminal proceedings; veto the arrest of a person suspected of a crime; and intercede against unfair fiscal exactions and enforced military service. Moreover, they were endowed with a minor jurisdiction in criminal and civil matters that was subject to an appeal to the provincial governor, and could arrest and transfer to the governor those accused of serious crimes.[135] For a phase, the *defensor* and his court were apparently successful in providing cheap and swift justice to members of the lower classes. However, in the long term the institution failed to achieve its goal of alleviating the conditions of the poor and the underprivileged. Probably the greatest difficulty was to locate, in this degenerate age, strong and upright men willing to undertake the burdens of the office and capable of resisting the pressures of the powerful. Hence, different methods for appointing holders of the said office were engaged now and then. Ultimately, the *defensor civitatis* became simply another extraordinary magistrate

[134] The *defensor civitatis* is the first recorded instance of what is today known under the name of ombudsman, a civil commissioner entrusted with the protection of citizens against maladministration and other acts contrary to law.

[135] The jurisdiction of the *defensor* pertaining to civil matters, although initially small, gradually expanded and attained considerable dimensions under Justinian.

and an instrument of the bureaucracy and the land-owning elite whose abuses he was originally destined to curb.

As the institution of the *defensor civitatis* proved short-lived, oppressed people increasingly sought protection from the Christian bishops whose influence in the administration of secular justice tended to intensify. From the perspective of the civilian population, the operation of the administration became increasingly oppressive and Christianity assuaged this situation. The faith embodied an egalitarian ideology that viewed all humans as equal before God and it exercised a mitigating influence in several fields on the conditions of the oppressed classes and groups. For example, bishops could frequently defend refugees who pursued sanctuary in churches, or intervene in favour of the accused or the convicted in criminal trials. Moreover, these bishops as religious heads of their towns were more effective than the *defensores* in protecting impoverished citizens against the unfair demands of imperial officials. One may declare in conclusion that during a period featuring the most lawlessness thus far in Roman history, the influence of the Church constituted an important element of civil stability and protective justice.